SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN (Indonesia/Malaysia) (The Philippines Intervening)*

On 13 March 2001, the Philippines filed an Application in the Court for permission to intervene in the proceedings of this case under Article 62 of the Court's Statute. On 23 October 2001, the Court delivered its judgment denying the permission.

I. HISTORY OF THE PROCEEDINGS[1]

By a joint letter dated 30 September 1998, Indonesia and Malaysia (the parties) filed at the Registry of the Court their Special Agreement signed in Kuala Lumpur on 31 May 1997 that entered into force on 14 May 1998. Under this Agreement, the parties requested the Court to determine on the basis of the treaties, agreements and any other evidence they furnished, whether sovereignty over Pulau Ligitan and Pulau Sipadan (the islands) belonged to Indonesia or to Malaysia.

The parties agreed that the written pleadings should consist of a Memorial, a Counter-Memorial and a Reply that they would submit simultaneously within certain fixed time limits. This included a Rejoinder (if the parties so agreed or if the Court decided *ex officio* or at the request of one of the parties that this part of the proceedings was necessary) and the Court authorised or prescribed the presentation of a Rejoinder. The Memorials, Counter-Memorials and Replies were filed within the prescribed time limit. Although the Special Agreement had allowed the parties to file a fourth pleading, they informed the Court by joint letter dated 28 March 2001 that they did not wish to do so and neither did the Court itself seek this.

By letter of 22 February 2001, the Philippines invoked Article 53(1) of the Rules of Court and asked the Court to furnish it with copies of the pleadings and documents annexed filed by the parties. Pursuant to this provision requiring the parties' views to be taken into account, the

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* [2001] ICJ Reports (forthcoming) at <www.icj-cij.org> (Judgment of the Court). This case is based on the summary of the judgment, ICJ Press Release 2001/28bis, 23 October 2001 at <www.icj-cij.org>. To trace the proceedings refer [1999] Australian International Law Journal 308-309; [2000] Australian International Law Journal 401.

[1] Judgment of the Court paras 1-17.

Court decided that it was inappropriate to grant the request.[2] On 13 March 2001, the Philippines applied for permission to intervene in the case, invoking Article 62 of the Court's Statute. In its Application, the Philippines explained that it considered its "request for copies of the pleadings and documents annexed as an act separate and distinct from" the Application. As such, it did not affect its earlier submissions and was a new and independent request.[3] The Application stated:[4]

> The Philippine interest of a legal nature which may be affected by a decision in the present case "is solely and exclusively addressed to the treaties, agreements and other evidence furnished by Parties and appreciated by the Court which have a direct or indirect bearing on the matter of the legal status of North Borneo". The Philippines also indicated that the object of the intervention requested was [threefold],
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> (a) First, to preserve and safeguard the historical and legal rights of the Government of the Republic of the Philippines arising from its claim to dominion and sovereignty over the territory of North Borneo, to the extent that these rights are affected, or may be affected, by a determination of the Court of the question of sovereignty over Pulau Ligitan and Pulau Sipadan.
> (b) Second, to intervene in the proceedings in order to inform the Honourable Court of the nature and extent of the historical and legal rights of the Republic of the Philippines which may be affected by the Court's decision.
> (c) Third, to appreciate more fully the indispensable role of the Honourable Court in comprehensive conflict prevention and not merely for the resolution of legal disputes.

The Application added that the Philippines did not seek to become a party to the dispute concerning sovereignty over the islands. Instead, the Application was "based solely on Article 62 of the Statute, which d[id] not require a separate title of jurisdiction as a requirement for this Application to prosper".[5]

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[2] Ibid para 6.
[3] Ibid para 7.
[4] Ibid.
[5] Ibid.

As the parties in their written observations had objected to the Philippine Application, the Court held public sittings in June 2001 pursuant to Article 84(2) of the Rules of Court to hear the views of all three States.[6] The Philippines concluded its oral arguments by stating that under Article 85(1) of the Rules of Court, "the intervening State shall be supplied with copies of the pleadings and documents annexed and shall be entitled to submit a written statement within a time-limit to be fixed by the Court". Further, Article 85(3) provided that "the intervening State shall be entitled, in the course of the oral proceedings, to submit its observations with respect to the subject-matter of the intervention."[7] Indonesia and Malaysia rejected these conclusions.[8]

II. THE COURT'S REASONING

After recalling the procedural history of the case, the Court considered the parties' contention that the Philippine application should not be granted for two main reasons: (1) the lateness of the Philippine submission and (2) its failure to annex documentary or other evidence to support its Application.[9]

(a) Timeliness of the Philippine Application[10]

The Court addressed the objection of the parties' *ratione temporis* by applying the Court's Rules on intervention to the factual circumstances of the case. The objection stated that the Philippine Application should not be granted because of its 'untimely nature' by referring to Article 81(1) of the Rules of Court that states:[11]

> An application for permission to intervene under the terms of Article 62 of the Statute...shall be filed as soon as possible, and not later than the closure of the written proceedings. In exceptional circumstances, an application submitted at a later stage may however be admitted.

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[6] Ibid para 11.
[7] Ibid.
[8] Ibid para 13.
[9] Ibid para 18-19.
[10] Ibid paras 18-26.
[11] Ibid para 20.

The Court indicated that the Philippines was aware that the Court had been seised of the dispute between the parties for more than two years before the Application was filed on 13 March 2001. By this time, the parties had completed three rounds of written pleadings (Memorials, Counter-Memorials and Replies) as required in the Special Agreement. The relevant time-limits had been publicly announced and the Agent of the Philippines had also stated during the oral hearings that his government "was conscious of the fact that *after* 2 March 2001, Indonesia and Malaysia might no longer consider the need to submit a final round of pleadings as contemplated in their Special Agreement".[12]

In light of the above, the Court found that the time the Philippines chose to file its Application could hardly be deemed to comply with Article 81(1) of the Rules of Court that it be filed "as soon as possible".[13] On this point, the Court relied on its earlier decision, *LaGrand (Germany v United States) (Provisional Measures)*[14] where it stated that "the sound administration of justice requires that a request for the indication of provisional measures be submitted in good time" and the same applied to an Application for permission to intervene.[15]

However, the Court noted that despite filing the Application at a late stage in the proceedings, the Philippines did not violate Article 81(1) establishing a specific deadline for such an application, namely, "not later than the closure of the written proceedings". The Court recalled that Article 3(2)(d) of the Special Agreement provided for the possibility of one more round of written pleadings (the fourth round on the exchange of Rejoinders) if the parties so agreed, the Court decided this *ex officio,* or one of the parties so requested. It was only on 28 March 2000 that the parties jointly notified the Court that their governments agreed that it was unnecessary to exchange Rejoinders.[16] Thus, although the third round of written pleadings terminated on 2 March 2001, neither the Court nor third States (including the Philippines) could know whether the written proceedings had indeed ended.[17]

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[12] See generally ibid paras 19-26.
[13] Ibid para 21.
[14] Order of 3 March 1999 [1999] ICJ Reports 14 para 19.
[15] Judgment of the Court para 21.
[16] Ibid para 24.
[17] Ibid.

Further, the Court could not 'close' the proceedings before it knew if the parties would plead a fourth round under Article 3(2)(d). Even after 28 March 2001 and in conformity with Article 3(2)(d), the Court itself could only authorise *ex officio* and prescribe the presentation of a Rejoinder, which the Court did not do. The Court therefore rejected the claim that the Philippines was 'untimely' when filing its Application.[18]

(b) Documentary or other Evidence not annexed to the Application[19]

The Court noted that Article 81(3) of the Rules of Court provided that an application for permission to intervene "shall contain a list of documents in support, which documents shall be attached". Here, the Court found that a State seeking to intervene was not necessarily required to attach any documents to its application to support its claims. It was only where such documents were attached to the application that such a list should be attached.[20] On this point, the Court applied its earlier decision in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Application to Intervene.*[21]

In the present case, the Special Agreement had provided for the possibility of further exchanges of pleadings even when the parties had filed their Replies. However, since the date of closing the written proceedings within the meaning of Article 81(1) of the Rules of Court still remained to be finally determined,[22] it followed that the Philippine Application could not be rejected on the basis of Article 81(3). As such, the Application was not filed out of time and contained no formal defect that prevented its grant.[23]

(c) Alleged Absence of a Jurisdictional Link[24]

In *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras) Application to Intervene*[25] the Court had to similarly consider Article 62 that provides:

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[18] Ibid.
[19] Ibid paras 27-30.
[20] Ibid paras 28-29.
[21] [1990] ICJ Report 98 para 12.
[22] Judgment of the Court para 29.
[23] Ibid.
[24] Ibid paras 31-36.
[25] [1990] ICJ Reports 133-134 paras 97-98.

1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.

In that case, the Court observed:[26]

> Intervention under Article 62 of the Statute is for the purpose of protecting a State's 'interest of a legal nature' that might be affected by a decision in an existing case already established between other States, namely the parties to the case. It is not intended to enable a third State to tack on a new case...An incidental proceeding cannot be one which transforms [a] case into a different case with different parties.
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> It...follows...from the juridical nature and from the purposes of intervention that the existence of a valid link of jurisdiction between the would-be intervener and the parties is not a requirement for the success of the application. On the contrary, the procedure of intervention is to ensure that a State with possibly affected interests may be permitted to intervene even though there is no jurisdictional link and it therefore cannot become a party.[27]

Thus, a jurisdictional link between the intervening State and the parties to the case was required only if the State seeking to intervene wished to become 'a party to the case'.[28] However, the Court found that this was not the situation here and the Philippines had sought to intervene in the case as a *non-party.*[29]

(d) Existence of an 'Interest of a Legal Nature' [30]

The Court first considered whether Article 62 precluded an 'interest of a legal nature' of the State seeking to intervene in anything other than

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[26] Ibid.

[27] Ibid 135 para 100; see also Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application to Intervene [1999] ICJ Reports 1034-1035 para 15.

[28] Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene [1990] ICJ Reports 135 para 99; Judgment of the Court para 35.

[29] Judgment of the Court para 36.

[30] Ibid paras 37-83.

the operative *decision* of the Court in the present case. After examining the English and French texts of the word 'decision',[31] the Court concluded that the interest of a legal nature to be shown by a State seeking to intervene was not limited to the *dispositif* of a judgment The Court added that it could relate to the reasons forming the necessary steps to the *dispositif*.[32] Following this conclusion, the Court considered the nature of the interest capable of justifying an intervention. In particular, it considered whether the interest of the State seeking to intervene should be in the subject-matter of the present case itself, whether it could be different and, if so, within what limits.[33]

The Court observed that whether a stated interest in its reasoning and any interpretations it might give was an interest of a legal nature for the purposes of Article 62 could only be examined by testing whether the legal claims outlined by the State seeking to intervene affected it.[34] Whatever the nature of the claimed 'interest of a legal nature' was and provided that it was not simply general in nature, the Court could only judge this issue *"in concreto* and in relation to all the circumstances of a particular case".[35]

The Court therefore proceeded to examine whether the Philippine claim of sovereignty in North Borneo could or could not be affected by the Court's reasoning or interpretation of treaties concerning the islands.[36] The Philippines had protested strongly that it was severely and unfairly hampered in 'identifying' and 'showing' its legal interest in the absence of access to the documents in this case. Further, it was not until the oral phase of the present proceedings that the two parties had stated publicly which treaties they considered were in issue in their respective claims to the two islands.[37]

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[31] The Court concluded that although the word 'decision' in English could be read in a narrower or broader sense, the French version was clearly broader: ibid para 47.
[32] See generally paras 46-47 ibid.
[33] Ibid para 48.
[34] Ibid para 55.
[35] Ibid. See Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) Application to Intervene [1981] ICJ Reports 12 para 19.
[36] Judgment of the Court para 56.
[37] Ibid para 62.

On these points, the Court found that the Philippines must have had full knowledge of the documentary sources relevant to its claim of sovereignty in North Borneo. While acknowledging that although it did not have access to the parties' written pleadings, the Court held that this did not prevent it from explaining its own claim, and from explaining in what respect any interpretation of particular instruments might adversely affect it.[38]

Applying *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras) Application to Intervene,*[39] the Court stated that a third State relying on its 'interest of a legal nature' (other than in the subject matter of the case itself) necessarily bore the burden to show clearly that this interest existed.[40] The Court added that the State had to show both "a certain interest in...legal considerations"[41] relevant to the dispute between the parties and an interest of a legal nature that could be affected by the Court's reasoning or interpretations.[42] The third State should be able to do this based on the documentary evidence upon which it relied to explain its own claim.[43] Thus, by not demonstrating any interest of a legal nature that could be affected in relation to these arguments warranting intervention under Article 62, the Court held that the Philippines had not discharged this burden of proof.[44]

(e) The Precise Object of the Intervention[45]

Addressing 'the precise object of the intervention' that the Philippine Application raised, the Court referred to its threefold object.[46]

First, the Court noted that other applications had used similar formulations when seeking permission to intervene, but the Court had not found legal obstacles to intervention there.[47]

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[38] Ibid para 63.
[39] [1981] ICJ Reports 117-118 para 61.
[40] Judgment of the Court para 59.
[41] Continental Shelf (Libya/Malta), Application for Permission to Intervene [1981] ICJ Reports 19 para 33.
[42] Judgment of the Court para 81.
[43] Ibid.
[44] Ibid para 82; see also ibid para 70.
[45] Ibid paras 84-93.
[46] Refer page 404 above.
[47] Judgment of the Court para 87. See Continental Shelf (Libya/Malta), Application

Secondly, the Court in its Order of 21 October 1999 in the recent case of *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria) Application to Intervene*[48] had reaffirmed this statement of one of its Chambers:[49]

> So far as the object of [a State's] intervention is 'to inform the Court of the nature of the legal rights [of that State] which are in issue in the dispute', it cannot be said that this object is not a proper one: it seems indeed to accord with the function of intervention.

Thirdly, the Court observed that although very occasionally mention was made of this during the oral pleadings, the Philippines did not develop this argument and neither did it contend that it could suffice on its own as an 'object' within the meaning of Article 81 of the Rules of Court. The Court therefore rejected the relevance of this third object in accordance with its Statute and Rules.[50]

III. THE COURT'S DECISION[51]

Concluding, the Court held that notwithstanding that the Philippines' first two objects were appropriate, it had not discharged its obligation to convince the Court that specified legal interests could be affected in the particular circumstances of this case. Therefore, in the operative paragraph of its judgment, the Court found that the Philippine Application seeking permission to intervene in the proceedings under Article 62 of the Statute of the Court could not be granted.[52]

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for Permission to Intervene [1984] ICJ Reports 11-12 para 17; Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene [1990] ICJ Reports 108-119 para 38, 130-131 para 90; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application to Intervene [1999] ICJ Reports 1032 para 4.

[48] Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), Application to Intervene [1999] ICJ Reports 1034 para 14.

[49] Judgment of the Court paras 88-89.

[50] Ibid para 90.

[51] Ibid para 95.

[52] The decision was carried by 14:1 votes (per Guillaume P; Shi V-P; Ranjeva, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal JJ; Weeramantry and Franck JJ *ad hoc;* Oda J dissenting).

IV. ODA J'S DISSENTING OPINION[53]

Oda J voted against the judgment's operative part because he firmly believed that the Philippine Application should be granted. He recalled the Court's four previous rulings[54] on intervention under Article 62:

1. In a Judgment delivered on 14 April 1981, the Court in *Continental Shelf (Tunisia/Libya), Application for Permission to Intervene*[55] denied Malta's Application unanimously.[56]
2. In a Judgment delivered on 21 March 1984, the Court in *Continental Shelf (Libya/Malta) Application for Permission to Intervene*[57] denied Italy's Application by 11:5 votes.[58]
3. In an Order dated 14 September 1990, a Chamber of the Court in *Land, Island and Maritime Frontier Dispute (El Salvador/ Honduras)*[59] found unanimously that Nicaragua had shown that it had an interest of a legal nature that could be affected by a judgment on the merits in the case. Accordingly, the Court held that Nicaragua could intervene in the case in certain respects.[60]
4. In an Order dated 21 October 1999, in *Land and Maritime Boundary between Cameroon and Nigeria,*[61] the Court held, unanimously, that Equatorial Guinea could intervene in the case as set out in its Application.[62]

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[53] The text of this Dissenting Opinion is annexed to the Court's judgment.

[54] Note that by Order dated 4 October 1984, the Court had also decided by 9:6 votes not to hold a hearing on the declaration of intervention pursuant to El Salvador's Application in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America).* For the Court's Order see <www.icj-cij.org /icjwww/idecisions/isummaries/inussummary841004.htm> (visited December 2001).

[55] [1981] ICJ Reports 23 para 1. For the text of this case see <www.icj-cij.org/icjwww/icases/itl/itl_isummaries/itl_isummary_19810414.htm> (visited December 2001).

[56] See Dissenting Opinion para 4.

[57] [1984] ICJ Reports 90 paras 2, 43. For the text of this case see <www.icj-cij.org/ icjwww/idecisions/isummaries/ilmsummary840321.htm> (visited December 2001).

[58] See Dissenting Opinion para 5.

[59] [1990] ICJ Reports 91, 135, 146. For the text of this case see <www.icj-cij.org/icj www/idecisions/isummaries/ishsummary900913.htm> (visited December 2001).

[60] See Dissenting Opinion para 6.

[61] [1999] ICJ Reports 1029. For the text of this case see <www.icj-cij.org/icjwww/ido cket/icn/icnorders/icn_iorder_19991021.htm> (visited December 2001).

[62] See Dissenting Opinion para 7.

Oda J stated that his position had "remained consistent throughout the Court's entire jurisprudence on this subject".[63] His view was that Article 62 of the Court's Statute should be interpreted liberally so as to entitle a third State that showed "an interest of a legal nature which *may* be affected by the decision in the case" to participate in the case as a *non-party.*[64] This was so even if this State had no jurisdictional link with the parties.[65] He recalled enunciating the same view in a lecture delivered in 1993 at The Hague Academy of International Law.[66]

Oda J felt that where participation as a *non-party* was permitted, it was not for the intervening State to prove in advance that its interest would be affected by the decision in the case. He considered that without participating in the merits phase of the case, the third State had no way of knowing the issues involved, particularly when it was refused access to the written pleadings. Thus, if its request for permission were to be rejected, he considered that the burden should be placed on the principal parties to show that this third State's interest would be unaffected by the decision in the case.[67] Oda J also felt that the question of whether, in fact, an intervening State did or did not have an interest of a legal nature could only be considered in the merits phase. He stated that after having heard the views of the intervening State in the main case, the Court might even find at times that the third State's interest would be unaffected by the decision in the case.[68]

Oda J added that the present proceedings had been dealt with in a way widely at variance with the above view.[69] The Philippines had learned of the subject matter of the dispute between Indonesia and Malaysia specified in Article 2 of the Special Agreement of 31 May 1997, but still did not know how they would present their position concerning sovereignty over the two islands. At best, the Philippines could

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[63] Dissenting Opinion para 2; see also ibid para 8.

[64] He added that the concept of non-party intervention had gained some support in the Court: ibid para 5; see also para 9. This concept was "probably" used for the first time in his Separate Opinion in Continental Shelf (Tunisia/Libya) Application for Permission to Intervene (Judgment) [1981] ICJ Reports 23; see Dissenting Opinion para 4.

[65] Dissenting Opinion para 4.

[66] Ibid para 9.

[67] See generally ibid para 11.

[68] Ibid para 12.

[69] For this discussion see generally ibid paras 13-14.

speculate that its interests in North Borneo *might* be affected depending on what Indonesia and Malaysia would say in the principal case. Following the objections of Indonesia and Malaysia, the Philippines had been refused access to the parties' written pleadings, preventing it from knowing whether or not its interests could, in fact, be affected by the Court's decision in the principal case. In seeking permission to intervene, all the Philippines could do, as it did in its Application, was to make known its claim to sovereignty in North Borneo, which could be affected by the decision in the case.[70]

Oda J considered that the burden was not on the Philippines but on Indonesia and Malaysia to assure the Philippines that its interests would not be affected by the Court's judgment in the principal case.[71] He questioned whether it was really reasonable – or even acceptable – for Indonesia and Malaysia to require the Philippines to explain how its interest could be affected by the decision in the case, while they concealed from it the reasoning supporting their claims in the principal case. At the time it filed its Application for permission to intervene, and at least until the second round of oral pleadings, the Philippines could not have known how the respective claims of Indonesia and Malaysia to the two islands would relate to its own claim to sovereignty over North Borneo.[72]

Oda J observed that the whole procedure in this case struck him "as being rather unfair to the intervening State".[73] He believed that the argument concerning "treaties, agreement and any other evidence" could not, and should not, have been made until the Philippines was afforded a chance to participate in the principal case.[74] This reasoning, he stated, accorded with the decision in *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*[75] allowing Nicaragua to intervene.

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[70] Ibid para 13.
[71] For this discussion see generally ibid para 14.
[72] Ibid paras 15-16.
[73] Ibid para 16.
[74] Ibid paras 15-16.
[75] [1990] ICJ Reports 91; see 412 above.